No. 17-1702

IN THE

Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORPORATION, *et al.*,

Petitioners,

v.

DEEDEE HALLECK, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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CONSTITUTIONAL PROVISION:

U.S. CONST. AMEND. I ..... *passim*

OTHER AUTHORITIES:

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INTERNET ADVERTISING BUREAU, IAB INTERNET ADVERTISING REVENUE REPORT, FULL YEAR 2017 AND Q4 2017, (May 10, 2018), *available at* https://tinyurl.com/yc2zhhur 18

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INTERESTS OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than amicus curiae, its members, or its counsel contributed money to fund the brief's preparation or submission. Counsel for all parties have consented to the filing of this brief.

more than three million businesses of every size, in every industry, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases raising issues of concern to the nation's business community.

This is one of those cases. Because businesses across industries open their private property up to speech by the public, the Chamber's members have an interest in ensuring the proper application of forum analysis and state action doctrine. If courts misapply those doctrines, private entities may suddenly face First Amendment liability and, from there, perhaps liability under other constitutional provisions as well. Thus, while the Chamber takes no position as to the ultimate disposition of this case, it has a strong interest in the governing rules of law.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Businesses routinely open up their private property for speech by members of the public. That is obvious in the era of YouTube, Twitter, and SnapChat. But it is hardly new. Since long before the dawn of the internet, grocery stores have provided bulletin boards for community members to post announcements; cafes have offered open mic nights for customers to present their poetry or their music; and magazines and newspapers have sold or given away space to customers that wish to advertise a product or celebrate a marriage, to name just a few examples.

While these privately run spaces for public speech help stoke the "marketplace of ideas" that the First

Amendment protects, *Matal* v. *Tam*, 137 S. Ct. 1744, 1766 (2017), the businesses that administer them are not subject to constitutional scrutiny. The Constitution's plain text and decades of precedent dictate that the First Amendment has "no part to play" when a private company regulates speech in a space it opens to the public. *Hudgens* v. *NLRB*, 424 U.S. 507, 521 (1976). Thus, before analyzing an allegation that a defendant has violated the First Amendment by censoring speech in a space open to the public, a court must first ask whether the defendant is a state actor subject to the Constitution. If, and only if, the defendant qualifies as a state actor, then the court may apply First Amendment forum analysis to decide if a constitutional violation has occurred.

That much should be elementary: The First Amendment regulates government actors and protects private entities. But in the decision below, the Second Circuit subverted that simple dichotomy by reversing the steps in the standard constitutional inquiry. Confronted with an alleged First Amendment violation, the Court of Appeals began by applying forum analysis. Then, having decided that the speech arena in question resembled a public forum, the Second Circuit concluded that Petitioners must be state actors because they run the forum, and "facilities or locations deemed to be public forums are usually operated by governments." Pet. App. 14a.

That jump in logic demonstrates the vice in reversing the order of operations. Undertaking a forum analysis first might be harmless (albeit pointless) if a court went on to apply a proper state-action analysis; but allowing forum analysis to drive the state-action

determination would wreak havoc on the First Amendment. Businesses offering their private spaces for public speech would see their efforts to promote speech rewarded with First Amendment litigation. Internet sites like YouTube and Twitter would be affected, but so would the countless grocery stores, cafes, and magazines that have historically provided fora for speech.

Courts, in turn, would need to apply First Amendment doctrines designed for government actors to this wide range of private entities—an unworkable and counter-productive exercise given that the First Amendment *protects* private actors. The scrutinized businesses would see reputational and financial harms as they would be forced to facilitate speech they find objectionable and offensive in order to prevent First Amendment liability. And the public, too, would suffer because there would be fewer opportunities to consume and share speech, as companies closed or limited spaces for public speech to avoid litigation.

Nor would these costs come with a countervailing benefit: Unlike governments, markets have strong incentives to provide spaces for more perspectives and a wider array of speakers, as businesses can profit from appealing to all corners of the marketplace. If existing market participants do not permit minority views, they will face competition from new entrants who will. There is therefore no need to distort the First Amendment to cover private entities merely because they operate a space that resembles a public forum.

Further, this doctrinal distortion may spill over into state action doctrine as a whole, making highly regulated entities particularly vulnerable to constitutional liability. This Court has repeatedly held that regulation alone does not convert private parties into government actors, and that licensing and funding do not transform private actors into state representatives. But adopting the Second Circuit's lax approach with respect to entities that open up spaces for speech would blur the bright line rules currently in place, and it would harm a wide range of businesses that will find themselves newly susceptible to regulation by courts imposing constitutional liability.

To avoid these negative consequences for the doctrine, the companies, and the public as a whole, this Court should reiterate that courts must apply standard state action doctrine at the outset of a forum analysis case, limiting the First Amendment to its proper role in policing *government* attempts to control speech. To hold otherwise would permit the First Amendment to do exactly what it is supposed to prevent the government from doing—intruding on the speech and associational interests of private entities.

ARGUMENT

I. THE CONSTITUTIONAL RULES GOVERNING FORA APPLY ONLY TO STATE ACTORS.

A. The First Amendment Protects Private Entities, Including Those That Open Fora For Speech, from Government Regulation.

"It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state." *Hudgens*, 424 U.S. at 513; *see also, e.g.*, *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 566 (1995) ("[T]he guarantee[ ] of free speech * * * guard[s] only against encroachment by the government and erect[s] no shield against merely private conduct" (internal quotation marks and alteration omitted)). The Framers adopted the First Amendment because they feared "silence coerced by law" and "the occasional tyrannies of governing majorities" that might be tempted to "discourage thought" through "fear of punishment." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269–271 (1964) (quoting *Whitney* v. *California*, 274 U.S. 357, 375–376 (1927) (Brandeis, J., concurring)). The First Amendment is designed to shield private speakers from these governmental intrusions. *Cf.* U.S. CONST. AMEND. I ("*Congress* shall make no law * * * abridging the freedom of speech" (emphasis added)).

The Framers therefore drafted the First Amendment to protect private entities, not to restrict them. For a company, as for an individual, the First Amendment guarantees the right to choose what to say, and how to say it. *Hurley*, 515 U.S. at 573-574.

And "[f]or corporations as for individuals, the choice to speak includes within it the choice of what not to say." *Pac. Gas & Elec. Co.* v. *Pub. Utils. Comm'n of California*, 475 U.S. 1, 16–17 (1986) (plurality op.).

B. State Action Doctrine Preserves The First Amendment Rights Of Private Entities.

State action doctrine is one way that courts protect companies' rights to choose what they will and will not say. The same constitutional restrictions that promote free speech when they apply to the government may curb speech rights if they are applied to private entities by narrowing their ability to choose the speech that occurs within their own spaces. The state action doctrine generally prevents that harm by dictating that courts may not impose the First Amendment's restrictions on any private actor unless the "seemingly private" conduct at the heart of the suit "may be fairly treated as that of the State itself." *Brentwood Acad.* v. *Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (internal quotation marks omitted). By applying state action analysis in First Amendment suits, courts ensure that they do not impermissibly limit a private defendant's speech rights in the name of vindicating the plaintiff's.

That is a particular danger in the context of public forum analysis. Forum analysis is used in First Amendment cases to "assess[ ] restrictions that *the government* seeks to place on the use of its property." *Int'l Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 678 (1992) (emphasis added). Under this approach, a court subjects government restrictions on speech to strict scrutiny when the court deter-

mines that the government property in question is a "traditional public forum"—that is, a space "that has traditionally been available for public expression." *Id.* A court may apply a lower level of scrutiny if the property in question does not meet that description. *Id.*

Importantly, however, public forum analysis applies exclusively when the government regulates speech on government property. A space that might be deemed a public forum if it were operated by the government is not treated as such if it is owned and run by a private entity. *Hudgens*, 424 U.S. at 513–521. "[M]embers of the public" simply do not "have the same right of free speech" on private property "as they would have on the similar public facilities in the streets of a city or town." *Id.* at 519 (quoting *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, 569 (1972)); *see also, Krishna*, 505 U.S. at 681 ("The practices of privately held transportation centers do not bear on the government's regulatory authority over a publicly owned airport[,]" just as "[t]he development of privately owned parks that ban speech activity would not change the public fora status of publicly held parks.").

Indeed, the Constitution forecloses the application of forum analysis to private entities: Traditional public fora require content and viewpoint neutrality. *See, e.g.*, *Hudgens*, 424 U.S. at 520 (citing *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975)). If these neutrality requirements are applied to private entities that open spaces for public speech, companies will be deprived of their ability to monitor content shared in their privately owned spaces. That, in turn, will compel businesses to associate with and

even facilitate ideas and speakers they find objectionable. But, as this Court has recognized, a company's First Amendment rights are violated where it is forced "to be publicly identified or associated with another's message." *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 470–471 (1997); *see also Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974) (holding that editorial control is a constitutional right). Like all speakers, "business corporations generally" have a First Amendment right to choose whether "to propound a particular point of view." *Hurley*, 515 U.S. at 574-575.

To prevent a violation of that right, courts must be vigilant in applying state action analysis at the outset of any suit that involves allegations that a private entity has improperly regulated speech in a public forum.

C. The Second Circuit Erred In Holding That Operating A Public Forum Generally Constitutes State Action.

In the decision below, the Second Circuit got things exactly backwards. Although Manhattan Community Access Corporation is nominally a private entity, the court did not begin by assessing whether Petitioners' conduct could "be fairly treated as that of the State itself." *Brentwood*, 531 U.S. at 295 (internal quotation marks omitted). Instead, it first decided that public access channels are traditional public fora because a public access channel resembles an "electronic version of the public square." Pet. App. 13a. Only then did the Second Circuit turn to the state action question, summarily concluding that Petitioners' activity must be a state action *because* Petitioners operate a public forum and "facilities or

locations deemed to be public forums are usually operated by governments." *Id.* 14a.

This analysis went wrong at every turn. By starting with the public forum inquiry, the court ignored the antecedent state-action question. *Brentwood*, 531 U.S. at 295. And, by assuming that operating a public forum qualifies as state action, the Second Circuit ignored this Court's precedent dictating that a private entity is not subject to constitutional scrutiny merely because it runs a space that is "similar" to a traditional public forum. *Hudgens*, 424 U.S. at 519.

In support of its confused approach, the Second Circuit relied almost exclusively on Justice Kennedy's concurrence—expressly disavowed by a majority of the justices—in *Denver Area Educational Telecommunications Consortium, Inc.* v. *FCC*, 518 U.S. 727 (1996) (plurality op.). But even if such reliance were appropriate, Justice Kennedy's opinion does not come close to supporting the proposition that an entity may be deemed a state actor merely because it operates a space that resembles a public forum.

The state action in *Denver Area* was obvious. Plaintiffs were challenging *Congress's* regulation of public access channels. *Id.* at 732. Even then, Justice Kennedy took care to note not only that there was a congressional statute at stake, but also that the cable channels were "public fora *created by local or state governments*." *Id.* at 792–794 (Kennedy, J., concurring) (emphasis added). In other words, Justice Kennedy found state action both in the regulation and the creation of the relevant space. Moreover, despite this state involvement, several justices would have held that public access channels

are *not* public fora because "[t]he public forum doctrine is a rule governing claims of a right of access to public property, and has never been thought to extend beyond property generally understood to belong to the government." *Id.* at 827 (Thomas, J., concurring in the judgment in part and dissenting in part) (internal quotation marks and citation omitted).

There is therefore *no* precedent permitting a court to assume that state action is involved merely because a space resembles a traditional public forum.

II. APPLYING FORUM ANALYSIS TO PRIVATE ENTITIES DISTORTS FIRST AMENDMENT DOCTRINE AND THREATENS HARM TO BUSINESSES AND THE PUBLIC.

If operating a space that resembles a traditional public forum were sufficient to establish state action, a vast array of private companies would be subject to First Amendment scrutiny for routine conduct. Internet companies that operate social-media platforms such as YouTube, Instagram, and Facebook would obviously be vulnerable, as those websites are frequently described as the modern day equivalent of the town square. *See, e.g.*, *Packingham* v. *North Carolina*, 137 S. Ct. 1730, 1737 (2017) (describing "social networking sites * * * like Facebook, LinkedIn, and Twitter" as "the modern public square"); *Coal. for Secular Gov't* v. *Gessler*, 71 F. Supp. 3d 1176, 1182 (D. Colo. 2014) ("[T]he internet is the new soapbox; it is the new town square."). But the implications of the Second Circuit's analysis would not end there.

This Court has found that a wide variety of speech arenas operated by government entities may be dubbed public fora. For example, the Court has held that state university meeting facilities, municipal theaters, and school board meetings all constitute public fora of one kind or another. *See Widmar* v. *Vincent*, 454 U.S. 263 (1981); *City of Madison Joint Sch. Dist.* v. *Wisconsin Emp't Relations Comm'n*, 429 U.S. 167 (1976); *Se. Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975). Private companies, too, operate meeting facilities and theaters and hold community gatherings. If this Court were to endorse the Second Circuit's approach, any one of these activities would suddenly subject a private company to First Amendment scrutiny.

The results would be devastating for First Amendment doctrine, private businesses, and the public as a whole.

A. First Amendment Doctrine Is Ill-Suited For Application To Private Entities.

This Court has already confronted multiple questions regarding how forum analysis applies to entities that are obviously governmental. *See, e.g.*, *Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250 (2015) (evaluating whether specialty license plates are a public forum); *Christian Legal Soc'y Chapter of the Univ. of California, Hastings Coll. of the Law* v. *Martinez*, 561 U.S. 661, 683 (2010) (applying public forum analysis to recognized student group policies at a public law school); *Krishna*, 505 U.S. at 680 (evaluating whether "airport terminals are public fora"). Those questions would only multiply if courts attempt to apply the doctrine to private entities. How, for example, does

one determine whether YouTube or Instagram more closely resembles a traditional public forum or a limited public forum when the government has never been involved with video or picture sharing sites *at all*?

Even if courts are able to wade through this inevitable morass, they would still face profound difficulties in applying First Amendment means-end scrutiny. When the government is the defendant, courts may apply the standard First Amendment balancing tests to ask whether there is a sufficiently important "*governmental* interest" justifying the speech restriction at stake. *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (internal quotation marks omitted). But how would a district court determine whether there is a significant *government* interest in regulating the speech at issue when the restrictions in question are not the government's? And what basis would a court have to insist that a private company run its business in accordance with an interest of the government? That would stand the First Amendment on its head by conscripting private actors for speech purposes.

Nor may courts avoid these difficulties by analyzing the strength of the *corporate* interest involved, rather than the governmental interest. The current tests insist on a significant *government* interest for good reason: The First Amendment addresses the government. Fashioning a new balancing test to incorporate some kind of compelling private-interest test would stray from the text and history of the amendment. It would also be a practical nightmare. Courts are ill equipped to scrutinize business interests or to make the necessarily subjective determina-

tion as to whether a particular company action best furthers the company's goals. *See, e.g.*, *United Copper Sec. Co.* v. *Amalgamated Copper Co.*, 244 U.S. 261, 263–264 (1917) (explaining that "business questions" are "left to the discretion of the directors" and courts "seldom" interfere with those decisions absent misconduct or a conflict of interest); *see also Auerbach* v. *Bennett*, 393 N.E.2d 994, 1000 (N.Y. 1979) ("[C]ourts are ill equipped and infrequently called on to evaluate what are and must be essentially business judgments. * * * [B]y definition the responsibility for business judgments must rest with the corporate directors; their individual capabilities and experience peculiarly qualify them for the discharge of that responsibility.").

This Court should not adopt a rule forcing lower courts down this uncharted road. The poor fit between First Amendment jurisprudence and corporate actors confirms that the First Amendment does not limit them.

B. The Policy Consequences Will Be Equally Severe.

Applying forum analysis to private companies that open up spaces to public speech would also have a raft of harmful policy consequences. It would hurt companies by forcing them to align with views that they or their customers find objectionable. And it would hurt the public by providing fewer opportunities for speech, not more.

1. *Subjecting companies to First Amendment scrutiny will inflict financial and reputational costs on affected businesses.*

Subjecting private companies to public forum analysis and the resulting First Amendment liability

would unfairly restrict their ability to control the spaces they own and operate. As noted, it would force companies to adhere to neutrality requirements that would violate the companies' own First Amendment rights. *See* pp. 7-9, *supra*. But the problems do not stop there.

Imposing a neutrality requirement would give users and courts, not companies, final say over what occurs in the company's space. That is flatly inconsistent with business owners' property rights that "must be respected and protected" alongside First Amendment freedoms. *Lloyd*, 407 U.S. at 570; *see also Hudgens*, 424 U.S. at 517 (explaining that prohibiting a private shopping mall from excluding picketers would allow "the Court to confiscate a part of an owner's private property and give its use to people who want to picket on it" (internal quotation marks omitted)).

Moreover, it would be deeply unfair to force companies to associate with views to which they object because that forced association could lead to financial and reputational harms. For example, a company that has built a reputation on civility and decency may be forced to allow users to post vulgar or offensive content. A business catering to all ages may be required to permit user content unsuitable for young viewers. And, more generally, any company might be forced to host material that undermines its mission or values, or even directly insults the company itself.

The compelled association with these objectionable views will drive off customers and decrease revenues. More subtly, the forced association with objectionable material may alter the host company's reputa-

tion, a particularly grave result given that companies rely on their reputations to draw in new customers and retain old ones. *See, e.g.*, DELOITTE, GLOBAL SURVEY ON REPUTATION RISK 2 (2014), *available at* https://tinyurl.com/ya5d3c5b (stating that more than twenty-five percent of a company's market value can be attributed to its reputation). Loyal customers who chose a company because of its values will take their business elsewhere when they see those values impugned by material in a company-sponsored space. That may tarnish brands, depress revenue, and, for publicly traded companies, lower stock prices. *See id.* at 7, 12. In short, companies' reputations—and in turn their bottom lines—will suffer if they are forced to put their weight behind all speakers, regardless of their viewpoint.

2. Applying forum analysis to private companies will lead to fewer outlets for speech.

Because of these potential reputational and financial harms entailed by constitutional liability, subjecting companies to forum analysis will also make businesses hesitant to operate spaces for speech that may be comparable to traditional public fora. That hesitance will ultimately lead to "less speech, not more." *Arkansas Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 680 (1998).

Many companies will stop operating fora where users post content if they cannot retain some control over what appears on them. Likewise, businesses will shrink from opening new fora for sharing content because of the costs associated with potential First Amendment challenges. Ultimately, this will lead to fewer privately sponsored fora for speech. *See id.* at 681 ("Were it faced with * * * cacophony on

the one hand, and First Amendment liability, on the other," a company may decide that "the safe course is to avoid controversy, and by so doing diminish the free flow of information and ideas." (internal quotation marks and ellipses omitted)). And the chilling effect will harm more than just the internet. Grocery stores may take down their announcement boards, cafes may cancel their open mic nights, and corporations may cancel community meetings if they fear that these activities will expose them to First Amendment litigation. These results cannot possibly serve "the marketplace of ideas" the First Amendment is designed to protect. *Tam*, 137 S. Ct. at 1766.

3. Inflicting these harms is unnecessary because market forces will lead to more openness by themselves.

No policy imperative justifies the harms that arise from extending First Amendment liability to private entities. To the contrary, important differences between public and private actors make it appropriate to apply First Amendment scrutiny only to the former.

Public officials have incentives to squash speech, particularly critical speech, in order to entrench their own political power, and—unlike private actors—they may use coercive power to accomplish that end. *See, e.g.*, Richard Klein, *The Empire Strikes Back: Britain's Use of the Law to Suppress Political Dissent in Hong Kong*, 15 B.U. INT'L L.J. 1 (1997). By contrast, private companies—particularly those that run internet sites—have market incentives to, at least collectively, provide fora for multiple viewpoints. Creating an expansive library of content will often increase a company's customer base and improve a

company's economic wellbeing. For example, a website that has a wide range of content appealing to a variety of viewers will typically enjoy a larger market share and, in turn, a higher potential to profit from selling advertisements. *See, e.g.*, Robert D. Buzzell et al., *Market Share—a Key to Profitability*, HARV. BUS. REV., Jan. 1975; Masoud Nosrati et al., *Internet Marketing or Modern Advertising! How?*, 2 INT'L J. ECON. MGM'T & SOC. SCIS. 56, 56 (2013) ("Most web sites, with the exception of transaction ones such as eBay, generate the preponderance of their revenues from the sale of advertising inventory * * * ."); INTERNET ADVERTISING BUREAU, IAB INTERNET ADVERTISING REVENUE REPORT, FULL YEAR 2017 AND Q4 2017, at 5 (May 10, 2018), *available at* https://tinyurl.com/yc2zhhur (noting that digital ad revenue increased by 21 percent to $88 billion in 2017). At the same time, companies that do not permit content from certain types of viewers will soon get competition from other websites that will cater to those who have been excluded.

In other words, the market will often do precisely what the First Amendment must accomplish with respect to state actors: It will prompt companies to open spaces that welcome a broad range of views, while encouraging new businesses to open fora for speakers that may previously have been silenced. Accordingly, there is no reason for this Court to rewrite the First Amendment to make it apply to private entities.

III. THE SECOND CIRCUIT'S APPROACH ALSO DISTORTS STATE ACTION DOCTRINE.

Time and again, the Court has rejected claims that a single characteristic—such as regulation or government funding—might be sufficient to make a private entity a state actor. But if this Court were to hold that the standard is satisfied when a private entity operates a public forum, it would significantly lower the bar for establishing state action. The consequences would be severe.

A. This Court Applies A Stringent State Action Standard.

While this Court has applied various tests to assess whether a particular case involves state action, it has consistently emphasized that it is a high bar. The state action requirement vindicates the text of the Constitution, which is directed only to the government, not private entities. It also "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 936 (1982). Thus, applying a stringent state action requirement "ensures that the prerogative of regulating private business remains with the States and the representative branches, not the courts." *Am. Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 52 (1999).

For these reasons, this Court has been reticent to find that a private entity's conduct may be attributed to the government. It is not enough, for example, that a state law permits a private actor to take some action. Thus, "a State's mere acquiescence in a private action" does not "convert[] that action into that of the State." *Flagg Bros.* v. *Brooks*, 436 U.S.

149, 164 (1978). Nor do most other forms of regulation convert a private entity into a state actor. *See Jackson* v. *Metro. Edison Co.*, 419 U.S. 345, 350 (1974). Rather, the presence of state or federal regulations is only relevant where the regulations actually "compel" the complained-of act. *Flagg Bros.*, 436 U.S. at 165–166; *see also Rendell-Baker* v. *Kohn*, 457 U.S. 830, 841–842 (1982) (finding no state action where challenged actions "were not compelled or even influenced by any state regulation"); *Blum* v. *Yaretsky*, 457 U.S. 991, 1004, 1010 (1982) ("[C]onstitutional standards [can be] invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains," which requires that the State have "dictate[d] the decision" at issue.); *Denver Area*, 518 U.S. at 737 (plurality op.) (the First Amendment "ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech—and this is so ordinarily even where those decisions take place within the framework of a regulatory regime" (emphasis omitted)). And in those situations, this Court has never suggested that a company may be liable for doing what regulations coerce but has only suggested that such regulations may be enjoined.

Thus, even "extensive state regulation" does not make a business a state actor. *Sullivan*, 526 U.S. at 52; *see also Blum*, 457 U.S. at 1004 (just because a business is "extensively regulated" does not make it a state actor); *Jackson*, 419 U.S. at 350 ("[T]he fact that the regulation is extensive and detailed, as in the case of most public utilities," does not "convert" a business's "action into that of the State."). Indeed, in *Sullivan*, *Blum*, and *Jackson*, this Court declined to

find state action in the highly regulated industries of workers compensation insurance, Medicaid-funded nursing homes, and public utilities, respectively.

By the same token, special, or even exclusive, dispensations from the government do not necessarily create state action, either. For instance, having one of a limited number of liquor licenses does not make a business a state actor. *See Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 177 (1972). Similarly, that Congress granted the right to use a particular trademark did not make the U.S. Olympic Committee a state actor. *See San Francisco Arts & Athletics, Inc.* v. *U.S. Olympic Comm.*, 483 U.S. 522, 543–544 (1987). And even when the government confers "monopoly status" on a business, that is not "determinative in considering whether" its contested act "was 'state action.'" *Jackson*, 419 U.S. at 351-352.

The same logic necessarily applies to businesses allocated bandwidth from the FCC for such uses as radio or television broadcasting, or for phone and internet mobile service—whether such an allocation is characterized as a grant of a monopoly over particular frequencies or receipt of one of a limited number of licenses. Indeed, this Court has recognized that such license-holders—far from being state actors—in fact enjoy a level of First Amendment protection *against* the government for their content decisions. *See, e.g., Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 636–637 (1994). Put simply, being acted upon by the state does not make one a state actor.

Nor does public money or subsidy transform private businesses into state actors. "That programs undertaken by the State result in substantial fund-

ing of the activities of a private entity is no more persuasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business." *Blum*, 457 U.S. at 1011; *see also San Francisco Arts*, 483 U.S. at 544 ("The Government may subsidize private entities without assuming constitutional responsibility for their actions."); *Rendell-Baker*, 457 U.S. at 841 ("[P]rivate contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.").

Finally, and perhaps most relevantly, a private company is not a state actor simply because it undertakes some task that serves the public or that is also undertaken by government entities. Rather, performing a public function triggers a finding of state action only when "the function performed has been 'traditionally the *exclusive* prerogative of the State.'" *Rendell-Baker*, 457 U.S. at 842 (quoting *Jackson*, 419 U.S. at 353); *see also, e.g.*, *Jackson*, 419 U.S. at 354 ("Doctors, optometrists, lawyers," and others "are all in regulated businesses, providing arguably essential goods and services, 'affected with a public interest,'" but "such a status [does not] convert[] their every action, absent more, into that of the State."); *Marie* v. *Am. Red Cross*, 771 F.3d 344, 364 (6th Cir. 2014) (rejecting assertion that the Red Cross is a state actor, even though it is a congressionally chartered entity that serves the public in myriad ways). This bar is so high that the Court's precedent provides but a single example of an instance where a private entity engaging in private activity meets that test: when it runs a company town. *Marsh* v. *Alabama*, 326 U.S. 501 (1946). And when the Court briefly

suggested that the public function test might apply more broadly in *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U.S. 308 (1968), it resoundingly repudiated that proposition only a few years later, *Hudgens*, 424 U.S. at 521.

This Court has therefore made clear that private entities rarely qualify as state actors. Any relaxation of this Court's high standard would upend decades of precedent.

B. The Second Circuit's Approach Lowers The Bar And Threatens Dire Results.

Finding state action merely because an entity hosts a space for public speech conflicts with this case law. While very few private entities qualify as state actors under this Court's tests, the Second Circuit's approach casts a much broader net.

If this Court blesses such an approach, it will sow serious doctrinal confusion. Courts will be uncertain as to how stringently they should apply the state action inquiry, and regulated parties will face blurry lines rather than a clear rule. If the specter of constitutional liability hangs over businesses due to a loosened state-action doctrine, they may feel compelled to act as if their conduct *will* be treated as state action. In that way, the "area of individual freedom" the strict state-action doctrine is supposed to assure, *Lugar*, 457 U.S. at 936, will be eviscerated.

What is more, the doctrinal contagion may spread, and courts may react to the loosening of the standard in the context of public forum analysis by lowering the state action bar in general. Courts might, for example, begin to treat private entities as state actors because they are part of a highly regulated industry, or based on some other such forbidden

consideration. The result will impose severe burdens on the First Amendment rights of private companies, as they are increasingly forced to associate with speech they oppose. *See Pac. Gas & Elec. Co.*, 475 U.S. at 15. And it may also lead to absurd results in other First Amendment contexts: If a teacher's "rights to freedom of speech or expression" are not shed "at the schoolhouse gate," would the same rule apply to an employee's rights at the office door of a highly regulated company? *See Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Would an oil company operating on public lands be unable to take action against a company executive who moonlights as an anti-fossil-fuel activist on cable news? Or would a private vaccine clinic that receives Medicaid funding be forced to employ a nurse who distributes anti-vaccination literature at the entrance the moment he goes off the clock? This Court should not test these questions by permitting lower courts to infer state action too broadly.

The potential problems go beyond the First Amendment. Under a loosened state action doctrine, would the Second Amendment require utility companies to allow their employees to carry firearms in the office? Would the Fourth Amendment stop investment banks from reading employee emails to catch insider trading? And would nursing homes and private schools face constitutional due process lawsuits when they make major administrative decisions, as was asserted in *Blum* and *Rendell-Baker*? If the answer to some or all of these questions is yes, then the Constitution will transform into a comprehensive scheme of business regulation.

The Framers and Congress never intended such absurd results when enacting the Bill of Rights or 42 U.S.C. § 1983. No matter how this Court rules in this case, it should follow decades of precedent and maintain the high bar for treating private businesses as state actors.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be vacated.

Respectfully submitted,

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